IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRANCE FOWLER, Petitioner :
: C.A. No. 14-151 Erie
v. :
:
JON FISHER, et al., Respondents :

FILED
OCT 14 2014
CLERK U.S. DISTRICT COURT
WEST. DIST. OF PENNSYLVANIA

REPLY TO RESPONDENT'S ANSWER

TO THE HONORABLE MAGISTRATE JUDGE SUSAN PARADISE BAXTER:

AND NOW COMES, Terrance Fowler, Petitioner, who submits this Reply to Respondent's Answer to his petition for Writ of Habeas Corpus and in support thereof avers the following;

I. PROCEDURAL HISTORY

Petitioner Terrance Fowler is a Pennsylvania prisoner, serving a sentence of 27 1/2 to 55 years for attempted murder, aggravated assault, conspiracy to commit robbery and possessing instrument of crime.

On July 7, 2010, Aleksandr Cheremnykh, a jewelry store owner, was shot in the chest during an attempted robbery in Erie, Pennsylvania. Petitioner was accused of this crime.

On July 14, 2011, Petitioner began a two day jury trial presided over by the Honorable Shad Connely of the Court of Common Pleas, Erie Pennsylvania. At the conclusion of the trial, Petitioner was found guilty of attempted homicide, aggravated assault, conspiracy to commit robbery and possessing instruments of crime.

Petitioner was represented by David G. Ridge, Esquire, at trial and on post-sentence motions.

On September 10, 2011, Petitioner was sentenced by Judge Connelly to an aggregate term of 27 1/2 to 55 years. Post-sentence motions were filed seeking reduction in sentence but were denied on October 10,2010.

Thereafter, Petitioner filed a timely Notice of Appeal with the Pennsylvania Superior Court. Counsel filed an **Anders**[1] brief and a motion to withdraw, asserting that the appeal was wholly frivolous. On June 1, 2012, the Superior Court affirmed Petitioner's judgment of sentence and granted counsel permission to withdraw.

On April 12, 2013, Petitioner filed a Post Conviction Relief (PCRA) petition. The court appointed counsel from the Erie County Public Defender's Association, who filed an amended PCRA petition reiterating (plagiarizing) Petitioner's memorandum filed with his pro se petition, raising the same grounds argued herein. The PCRA court denied the petition without a hearing on July 17, 2013.

Following the PCRA court's denial, Petitioner filed a timely notice of appeal and requested permission to proceed pro se after

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1. **Anders v. California**, 386 U.S. 738 (1967)

appointed counsel sent him a letter opining that his issues lack merit.[2] The PCRA court held a hearing pursuant to **Commonwealth v. Grazier**, 552 Pa. 9, 713 A.2d 81 (1998), to determine whether Petitioner knowingly and intelligently waives his right to counsel [state law right]. On October 15, 2013, following Grazier hearing, the PCRA court granted Petitioner's request to proceed pro se.

On appeal, Petitioner raised the identical issues raised in his PCRA petition and herein. The Pennsylvania Superior Court affirmed the PCRA court's denial on March 3, 2014. Based on a conflict within the court, relying on **Commonwealth v. Cope**, 359 Pa.Super. 140, 518 A.2d 819 (Pa.Super.1986), Petitioner requested a Reargument En banc based on Cope's reading that once a court finds that counsel failed to file a motion to suppress, the proper remedy is to remand the case for an evidentiary hearing to argue prejudice. The Reargument was denied on March 27,2014.[3]

Petitioner filed the instant timely petition under 28 U.S.C. §2254 for Writ of Habeas Corpus on May 23, 2014.

II. EVIDENCE AT TRIAL

This prosecution arose out of the July 7, 2010, shooting of Jewelry store owner Aleksandr Cheremnykh. Petitioner was

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2. see Exhibit "A" attached

3. The Commonwealth **never** mention in their Answer that a Reargument petition was filed in the Pennsylvania Superior Court from the denial by the Superior Court from the PCRA court for not remanding the case to allow Petitioner to prove how he was prejudiced by the suggestive identification.

convicted of this crime on the strength of Bruce Wagner the State's only eyewitness. Additional prejudicial evidence was admitted and will be discussed infra.

A. Aleksandr Chermnykh

The Commonwealth's first witness testified that two masked men entered his jewelry store and demanded that he open his safe. After he refused, one of the men shot him. Mr. Cheremnykh testified that he could not make an identification of either male. N.T. 7/14/11, at 23-36.

B. Bruce Wagner

Bruce Wagner testified that while watching television on July 7, 2010, he noticed a car pull up with two men it. The men looked suspicious and drove away. The same car pulled up and parked about ten minutes later. At this time, Wagner testified he ran out his residence and wrote down the license plate number of the car the men were in. After the men returned to the car and drove away, Wagner testified that he heard the call of a robbery on his police scanner. He then came out his residence and gave the police the information that he had written down. N.T. 7/14/11, at 50-56.

Wagner testified that he never gave the police a description of the perpetrators features nor did he ever identify Petitioner's photo before viewing him at the preliminary hearing months later, where the hearing was postponed on several occassions and Wagner was informed each time that Petitioner was the suspect. N.T. 7/14/11, at 76-77; 80-83 Wagner allegedly identified Petitioner from a window 40-50 feet away without his glasses. Importantly, Wagner testified that he saw Petitioner on television in handcuffs prior to the preliminary hearing. N.T. 7/14/11, 71, 80.

Notably, Wagner appeared at the preliminary hearing eventually and misidentified Petitioner's allege accomplice [Dixon] by identifying Petitioner's father. Wagner testified that he was as sure of his identification of Petitioner's accomplice as he was of Petitioner. N.T. 7/14/11, at 83. What also deserves mention, is Wagner never actually witnessed the crime.

C. Detective Adam DiGilarmo

Detective Digilarmo testified that while searching Petitioner's bedroom he recovered a Mossberg 12 Guage shotgun. After testifying to retrieving the weapon, the Commonwealth sought to introduce exhibit 13 into evidence. Defense counsel objected and the trial court reserved ruling until the end of the Commonwealth's case, where he ruled the evidence was more prejudicial than probative and excluded it. N.T. 7/15/11, at 31.

D. Detective Jim Spagel

Detective Spagel testified that Petitioner while discussing the reasons for his arrest and why he was brought to the police station, stated he dropped his girlfriend and daughter off around 9:30 a.m. in the morning, and that he was in possession of the car. N.T. 7/14/11, at 118.

E. James Fowler

Mr. Fowler testified as an alibi witness. He testified that Petitioner, his girlfriend and daughter left the house the morning of July 7, 2010, shortly before 9;00 a.m.. He testified that Petitioner was gone for no more than a hour, but he doesn't know the exact time but that he was adamant that it wasn't more than an hour. N.T. 7/15/11, at 40, 42.

Fowler also stated during his testimony that Petitioner did not leave the house after returning. The next time Petitioner left the house was when the police came and took him and Petitioner to the police station. id. at 42.

F. Katie Peterson

An employee at Glenwood Park YMCA testified that Petitioner dropped his daughter off at the YMCA on July 7, 2010, the day of the crime, at 9:30 a.m., no later than 9:45 a.m.. N.T. 7/15/11, at 59-60.

G. Tabet Vaughn

Ms. Vaughn testified as a character witness that Petitioner is a peaceful, quiet and loving, good family guy. N.T. 7/15/11, at 62-63.

III. STANDARDS FOR DECISION

A. Standards for Decision Under 28 U.S.C. §2254

The writ of habeas corpus is available to a state prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States," and relief may be granted where the state court's decision on the constitutional claim presented "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," 28 U.S.C. §2254(d)(1). Writing for the Court in **Williams v. Taylor**, 529 U.S. 362 (2000), Justice Sandra Day O'Connor explained the meaning of §2254(d)(1) as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

529 U.S. at 412-413. The "unreasonable application" clause encompasses either unreasonably applying the facts of the case to the correct governing legal rule, or unreasonably extending or failing to extend a legal principle from Supreme Court precedent. **Moore v. Morton**, 255 F.3d 95, 104 (3d Cir. 2001). **See also** **Matteo v. Superintendent, SCI-Albion**, 171 F.3d 877 (3d Cir.), cert. denied 528 U.S. 824 (1999).

In addition to the "contrary to" and "unreasonable application" clauses of 28 U.S.C. §2254(d)(1), moreover, 28 U.S.C. §2254(d)(2) also permits relief to be granted where the decision is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See also 28 U.S.C. §2254(e)(1), establishing a presumption of correctness for state factual determinations, unless rebutted by "clear and convincing evidence."

B. Standards for Proving Ineffectiveness Claims

The right to effective assistance of counsel is guaranteed under the Sixth and FOurteenth Amendments to the United States Constitution as well as similar sections of the Pennsylvania Constitution. To support a claim of ineffective assistance under Pennsylvania standards, it is necessary to show that the underlying claim is of arguable merit, that counsel had no reasonable strategic basis for his act or omission, and that counsel's ineffectiveness prejudiced the petitioner. **Commonwealth v. Pierce**, 786 A.2d 203, 213 (Pa.2001). As articulated by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668 (1984), the standard is two pronged.

First:

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified

> acts or omissions were outside the wide range of professionally competent assistance.....

466 U.S. at 690. Second:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

466 U.S. at 694.

IV. ARGUMENT

A. Ground One: Ineffective Assistance of Trial Counsel for Failing to Request an Alibi Instruction after Presenting Alibi Evidence.

"An alibi is a defense that places a defendant at the relevant time at a different place than the crime scene and sufficiently removed from that location such that it was impossible for him to be the perpetrator." **Commonwealth v. Sileo**, 32 A.3d 753, 767 (Pa.Super.2011). In adjudicating this claim, the Pennsylvania Superior Court held that Petitioner's alibi witness [James Fowler] did not make it impossible for Petitioner to have been the perpetrator of the robbery. "Indeed, his testimony regarding how long Fowler [Petitioner] had been home prior to the arrival of the police placed Fowler [Petitioner] out of the home at the time of the robbery." Superior Court Opinion (Superior Ct. Op.) at 9-10. Petitioner contends the Pennsylvania Superior Court decision was an unreasonable determination of the facts in light of the evidence presented in state court, 28 U.S.C. §2254(d)(1), and also an unreasonable application of **Strickland v. Washington,** 104 S.Ct. 2052 (1984), §2254(d)(1).

The following testimony was elicited from James Fowler on direct examination from defense counsel:

> Q. So that morning, it was just you, Terrance [petitioner], Tashara and Taren?
>
> A. Yes.
>
> Q. So they left your house around **nine.** Did you see--before nine?
>
> A. Before nine..........
>
> Q. To the best of your recollection, to the best of your ability, about how long do you think he was gone?
>
> A. **might have been not quite an hour.....**
>
> (N.T. 7/15/11, at 38-40)
>
> Q. To the best of your recollection then, how long had Terrance [petitioner] been home before the police got there?
>
> A. It wasn't quite an hour, maybe 45, 50 minutes. About - -almost an hour.
>
> Q. And when he left that morning with Tashara and Taren, after he came back home, **did you ever see him leave again?**
>
> **A. No.**
>
> (7/15/11, at 42)

On cross-examination by the prosecutor, the following was elicited by the prosecutor:

> Q. So you could say with certainty, he left to take his girlfriend to work and his - -
>
> A. Positive he left and took them. Its that way everyday.
>
> Q. At some point in time, he comes back to your house. You're not quite sure exactly what time that is, right?
>
> **A. I'm not saying - - to the best my recollection, it was around that time.**
>
> (N.T. 7/15/11, at 50)

From a reading of the above testimony, James Fowler's testimony can be lucidly construed to mean that Petitioner left before nine o'clock and was not gone for more than an hour. The robbery occurred around 11:30 a.m.. So clearly this testimony places Petitioner at home when the crime occurs. The state court opinion misconstrues the crux of Mr. Fowler's testimony, when it held, "when confronted on cross-examination about his time frame not matching with the statement given by Fowler [petitioner] to police, James Fowler reiterated that he was unsure and that he did not 'look at the clock or anything.'" Superior Ct. Op. at 8.

Reading James Fowler's testimony true to its text, it shows that Petitioner was going not more than a hour when he left the house before nine, but he didn't know the exact time. What is important about his testimony and the Superior Court apparently overlooked it, is the fact that he couldn't have been at the scene of the crime at 11:30 a.m. even considering Petitioner's testimony that he dropped his daughter off at 9:45 or 10:00 a.m., it still doesn't place Petitioner at the scene of the robbery which occurred at 11:30 a.m.. James Fowler was consistent that once Petitioner came home he never left until the police arrived. Any minor inconsistencies was for the jury to consider. The question for this Court was did Petitioner present sufficient evidence to warrant an alibi instruction. See **Sileo, supra.**

" A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." **Strickland** 466 U.S. 687.

Turning to the present matter, trial counsel filed a notice to present an alibi defense. Counsel presented alibi evidence i.e., James Fowler's testimony. Counsel established on direct examination of Mr. Fowler that Petitioner was not gone from the house more than an hour after leaving no later than 9:00 a.m.. Counsel explained to the jury in his closing arguments that James Fowler......"**and that by itself can create reasonable doubt in your mind....**" N.T. 7/15/11, at 81.

The actions and remarks by counsel show that he presented an alibi defense, but simply for no apparent reason, forgot to request an alibi instruction. His remarks to the jury is the instruction given to the jury by the trial court upon request for an alibi instruction. If indeed his intentions were not request an alibi instruction because he didn't present alibi evidence -which is absurd- why would he suggest to the jury that James Fowler's testimony alone could be doubt?

In **Commonwealth v. Mikell**, 729 A.2d 566 (Pa.1999), the court was faced with a case where no alibi instruction was given. The defendant presented the testimony of his mother and sister that he was home in bed at the time of the murder for which he was charged. The court stated that when evidence of an alibi has been introduced, a defendant is entitled to an alibi instruction. The prosecution in its argument had stated that the alibi evidence presented was not particularly compelling since these were close relatives testifying. However, the court ruled that issues of credibility are for the jury to decide and the failure to request such an instruction is ineffective assistance of counsel.

During the defense case, the following colloquy was conducted by the trial court in reference to Petitioner's defense of alibi:

> MR. RIDGE [DEFENSE COUNSEL]: We do...the other reason --matter, judge is the notice of alibi defense was filed by the defense in this case, which includes Terrance's [petitioner] father, James Fowler, who has testified, and two other female individuals. Again, for the defense reasons, for defense strategy, we're not calling those other witness. They're still available to us. That's a decision I have discussed with Terrance. I believe

Terrance also agrees with that; am I correct?

THE DEFENDANT: Yes, sir.

(N.T. 7/15/11, at 56)

Thus, the above discussion was held after James Fowler testified. Its crystal clear that the defense of alibi was the defense. Because of that, its incogitable that counsel would forego such an important instruction. The perils of not proven the defense will be taken by the jury as a sign of the defendant's guilt. In other words, counsel failure to request an alibi instruction after presenting alibi evidence, actually works against the defendant. See also opening arguments N.T. 7/14/11, at 18 (counsel arguing the fact that James Fowler will testify that his son left to run an errand came back and did not leave again).

The Fifth Amendment guarantees the right to present a meaningful defense and the Sixth Amendment guarantees the right to compulsory process. **Holmes v. South Carolina**, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed. 2d 503 (2006), **Crane v. Kentucky**, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). Read together, the Fifth and Sixth Amendment guarantee the defendant the right to put before the jury evidence that might influence the determination of guilt. **Pennsylvania v. Ritchie**, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); accord **Washington v.**

Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

As a result of counsel's actions, Petitioner was denied his right to effective assistance of counsel. The state court conclusion unreasonably applied **Strickland v. Washington**, and unreasonably applied the evidence that was presented in the state court. For these reasons, this Court should grant Petitioner the writ, and require the state court to retry him.

B. GROUND TWO: Ineffective Assistance of Trial Counsel for Failing to File Motion to suppress the Commonwealth's Eyewitness In-Court Identification.

In reviewing the Pennsylvania Superior Court decision, that court never determined whether or not trial counsel's performance was deficient. However, the court ruled that Bruce Wagner's subsequent identification of Fowler [petitioner] was an "impermissible suggestive identification." Superior Court Opinion (Superior Ct. Op.) at 12. The Superior Court decision rest on the court's conclusion that Petitioner failed to show prejudice because there was other evidence linking him to the crime. Superior Ct. Op. at 13. A "court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiences." **Strickland** 466 U.S. at 697.

However, on the record, it is clear that even if the state court had determined that Petitioner trial counsel was not deficient in this regard, such a determination would be an unreasonable application of **Strickland.** See also **Neil v. Biggers**, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); **Manson v. Brathwaite**, 97 S.Ct. 2243 (1977). In evaluating the likelihood of an accused's misidentification for purposes of determining whether he has been deprived of due process, the factors to be considered include the opportunity of the witness to view the criminal at the time of the crime, the witness degree of tension, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation. **Neil v. Biggers**, supra.

The record in the state court unequivocally show that Wagner identified Petitioner for the first time in court after viewing him in handcuffs on a news program. The record further reflects that Petitioner's preliminary hearing was continued on several occassions where Wagner got the opportunity to view Petitioner and was informed that he was the guy charged. Moreover, Wagner misidentified Petitioner's alleged accomplice and testified at the preliminary hearing that he was as certain of his identification of Petitioner as he was of his identification of Petitioner's accomplice. Superior Ct. Op. at 12-13. Notwithstanding the impermissible encounter violative of

Petitioner's due process, the Superior Court held Petitioner was not prejudiced, therefore, counsel cannot be held to be ineffective for failing to file motion to suppress the identification.Superior Ct. Op. at 14.

To show prejudice, **Strickland** requires a petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." **Strickland**, 466 U.S. at 694. This requires more than just a "conceivable" likelihood of a different result. **Harrington v. Richter**, 131 S.Ct. 770, 792 (2011). However, a petitioner "need not show that counsel's deficient performance 'more likely than not altered the outcome of the case'-rather he must show only 'a probability sufficient to undermine confidence in the outcome.'" **Jacobs v. Horn**, 395 F.3d 92, 105 (3d Cir.2005)(quoting **Strickland**, 466 U.S. at 693-694). Moreover, "the effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial; ' a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" **Rolan v. Vaugh**, 445 F.3d 671, 682 (3d Cir.2006)(quoting **United States v. Gray**, 878 F.2d 702, 710-711 (3d Cir.1989)(quoting **Strickland**, 466 U.S. at 696)).

Aside from the inadmissible evidence of Bruce Wagner, the Commmonwealth's only alleged eyewitness, and the inadmissible prejudicial evidence of Detective Adam DiGilarmo, who testified to finding a shotgun in Petitioner's bedroom, the Commonwealth's case would be nonexistent. Without these two pieces of inadmissible evidence, no reasonable instructed jury would have found Petitioner **guilty** of this crime.

The State rests its case on the fact that Petitioner admitted to the police that he was the only person in control of the vehicle seen on the day of the robbery between 9:30 a.m. and the time the police arrived to speak with him. N.T. 7/14/11, at 119; Superior Ct. Op. at 13. Excluding the inadmissible evidence mentioned above, the State court would have had a difficult time convicting Petitioner on the evidence that would have been before a properly instructed jury.

In Pennsylvania, evidence of a defendant's association with the perpetrator of the crime, presence at the scene of the crime, or knowledge of the crime cannot establish an unlawful agreement. **Commonwealth v. Murphy**, 577 Pa. 275, 844 A.2d 1228, 1238 (Pa.2004); See also **Jackson v. Virgina**, 443 U.S. 307 (1979). The fact that Petitioner's car was alleged to have been scene at the crime is insufficient to establish guilt. Mr. Wagner's impermissible suggestive in-court identification of Petitioner had "a substantial and injurious effect or influence in determining the jury's verdict." See **Brecht v. Abrahamson**, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). "Grave doubt" about the effect of the error means "we conclude that the error was not harmless." See **Fry v. Piller**, 551 U.S. 112, 121 n.3 (citing **O'Neal v. McManinch**, 513 U.S. 432, 435 (1995)).

Where it is determined that counsel has been ineffective for failing to file a pre-trial motion to suppress evidence, the relief to be awarded is the right to challenge the questioned evidence in an evidentiary hearing. Only if it is thereafter determined that the evidence should have been suppressed will the defendant become entitled to a new trial. It is improper use of illegally obtained evidence which entitles a criminal defendant to a new trial, and not merely the failure of trial counsel to file a pre-trial motion to suppress. **Commonwealth v. Cope**, 518 A.2d 819 (Pa.Super.1986). Notwithstanding this clear precept, Petitioner was thwarted from demonstrating prejudice in the state court.

As a result of the state court decision being an unreasonable application of clearly established law, i.e. **Strickland v. Washington**, and an unreasonable determination of the facts in light of the evidence presented in the state court, 28 U.S.C. §2254(d)(1)-(2), Petitioner respectfully urge this Court in the interest of justice to award him with a new trial.

C. GROUND THREE: Ineffective Assistance of Trial Counsel for Failing to Request Curative Instruction When the Commonwealth Admitted Prejudicial Evidence at Trial.

The law is clear in this circuit that an attorney can be ineffective in violation of the Sixth Amendment for failing to protect state law rights. **Breakiron v. Horn**, 2011 WL 1458795, *7-9 (3rd Cir.2011)(counsel ineffective for failing to request instruction that defendant was entitled to under state law); **Albrecht v. Horn**, 485 F.3d 103, 137 (3d Cir.2007). In the instant case, counsel was just that, ineffective for failing to request a simple curative instruction to negate any harm to Petitioner's right to a fair trial.

In Pennsylvania, evidence that is not relevant is not admissible. **Pa.R.E. 402; Commonwealth v. Robinson**, 554 Pa. 293, 304-305, 721 A.2d 344, 350 (1998)("The threshold inquiry with admission of evidence is whether the evidence is relevant"). Pennsylvania Rule of Evidence 401 defines "relevant evidence" as that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. **Pa.R.E. 401; Commonwealth v. Owens**, 929 A.2d 1187 (Pa.Super.2007).

The Commonwealth introduced evidence that Petitioner possessed a shotgun in the bedroom of his residence, which was totally irrelevant, and only introduced to show the Petitioner's propensity to commit crimes. Trial counsel objected after the testimony was introduced and the Commonwealth moved to place the picture of the gun into evidence. N.T. 7/15/11, at 16. The problem was that the jury already heard the testimony from the detective. The trial court delayed his ruling until the close of the Commonwealth's case, and ruled that the Commonwealth will not be allowed to move into evidence exhibit 13, because it is far more prejudicial than probative. N.T. 7/15/11, at 31. Counsel never for no apparent reason requested that the court admonish the jury to disregard Detective Adam DiGilarmo testimony involving the weapon. See **United States v. Himmelwright**, 42 F.3d 777 (3rd Cir.1994)(introduction of evidence that a defendant possessed a firearm in the course of a prosecution of that defendant for unrelated threats has been found to be error of such profoundly prejudicial quality that it compels reversal of a conviction).

In the instant matter, counsel's performance was deficient, and the Respondent's concede as much. The State again, as in claim (B) argue Petitioner cannot establish prejudice. The state court record belies this assertion and as a result the State court unreasonably applied **Strickland.** The record attest that without this prejudicial incendiary testimony, there's a reasonable probability of a different outcome. Without this evidence, the State would have attempted to convince a jury that

Petitioner's car was at the crime scene so he's [petitioner] guilty. Mere presence at the scene does not make you guilty. See **Commonwealth v. Murphy**, 844 A.2d 1228 (Pa.2004). There was no other evidence that demonstrated Petitioner's participation in any crime. In totality, or individually, Petitioner was denied a fair trial in violation of the Sixth and Fourteenth Amendments due to counsel's actions.

Moreover, contrary to the States's argument, an error is not harmless if the constitutional violation had a "substantial and injurious effect" on the fairness of the trial. **Fry v. Piller**, 551 U.S. 112, 121, 127 S.Ct. 2321 (2007)(quoting **Brecht v. Abrahamson**, 507 U.S. 619, 637, 113 S.Ct. 1710 (1993). Is it inconceivable to infer that because he [petitioner] had an illegal shotgun that he had the propensity to commit the crime charged. The court in **Himmelwright** thought so, and reversed the conviction. A finding of actual prejudice is appropriate when there is "grave doubt" about whether the error influenced the jury's decision. See **O'Neal v. McAninch**, 513 U.S. 432, 436, 115 S.Ct. 992 (1995).

In considering this claim, "a habeas court must determine what arguments or theories supported or......could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurist could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the [the Supreme Court]." **Harrington**, 131 S.Ct. 786. Fairminded jurist would not disagree because of the clarity and weight of this prejudicial evidence [shotgun] coming before the jury.

As a result of counsel's deficiences, and the State's unreasonable application of clearly established federal law, Petitioner urges this Court to remand for a new trial.

D. GROUND FOUR: Ineffective Assistance of Counsel for Failing to Request Kloiber Instruction.

The Pennsylvania Superior Court decision regarding this claim was an unreasonable determination of the facts presented in state court, 28 U.S.C. §2254(d)(2), as well as an unreasonable application of clearly established Supreme Court precedent that of **Strickland v. Washington**, 466 U.S. 668 (1984).

Particular state law rights can be so important that a lawyer can be held to have violated the Sixth Amendment right to effective assistance of counsel for failing to protect state law rights at trial or pre-trial. See e.g., **Commonwealth v. Kilgore**, 719 A.2d 754 (Pa.Super.1998)(counsel ineffective for failing to assert rights under Article I, Section 8 of the PA Constitution); **Breakiron v. Horn**, 2011 WL 1458795, * 7-9 (3rd Cir.2011)(counsel ineffective for failing to request instruction that defendant was entitled to under state law); **Albrecht v. Horn**, 485 F.3d 103, 137

(3rd Cir.2007); accord **Carpenter v. Vaughn**, 209 F.3d 280 (3rd Cir.2000).

Petitioner contends the State court decision involving this claim is troubling. First, the record supports that Bruce Wagner never had an independent basis for his in-court identification this is why claim (B) was significant for counsel to pursue. Second, Wagner misidentified Petitioner's accomplice and testified at the preliminary hearing that he was as certain of his identification of Petitioner as he was of his accomplice. The Superior Court acknowledged this fact as much in their opinion involving claim (B). Superior Ct. Op. at 13. With that being the facts, how didn't Wagner fail to identify Petitioner on a prior occassion?

"A kloiber instruction informs the jury that an eyewitness identification should be viewed with caution when either the witness did not have an opportunity to view the defendant clearly, equivocated on the identification of the defendant, or has had difficulties identifying the defendant on a prior occasions." **Commonwealth v. Sanders**, 42 A.3d 325, 332 (Pa.Super.2012), appeal denied, __ Pa. __, 78 A.3d 1091 (2013); **Commonwealth v. Kloiber**, 106 A.2d 820 (Pa.1954).

In light of **Kloiber**, and the circumstances of this case , how could the State dare say that counsel was not ineffective for failing to request this instruction when it was clearly warranted? **Strickland** made it clear that judicial scrutiny of counsel's effectivenes must be "highly deferential." A fair assessment of attorney performance requires that every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." id. at 687.

Trial counsel in the instant matter knew that Wagner failed to identify Petitioner's accomplice at the preliminary hearing and that Wagner testified that he is as sure about his identification of Petitioner as that of his accomplice. Counsel actually reiterated this point during cross-examination of Wagner at trial. The following is the trial testimony:

> Q. All right. And do you remember that I think maybe one of the last questions or question I asked you was are you as sure of your identification about the second guy as you are of your identification of my client, Terrance Fowler [petitioner], and you said your were just as sure about both, weren't you? correct
>
> A. I guess so, yes.
>
> Q. I mean is that fair?
>
> A. That's fair
>
> (N.T. 7/14/11, at 83-84)

Moreover, trial counsel knew that Wagner's identification of Petitioner was from 40-50 feet away and that Wagner wore glasses. N.T. 7/14/11, at 71. Based on what counsel knew at the time of trial, it is simply unimaginable that an attorney acting within the realms of professional norms would forego such an important charge. Mr. Wagner was the indispensible lynphin to the Commonwealth's conviction. Without his identification of Petitioner, the Commonwealth's case would have been insufficient to convict. Clearly counsel's actions were deficient.

In making the prejudice determination, Petitioner respectfully asks this court to recognize that prejudice, under **Strickland**, is not an outcome-determinative test. Id. 466 U.S. at 693-694. The question is not whether representation by effective counsel would have actually changed the verdict, nor even whether representation by effective counsel would "more likely than not" have changed the outcome. Id. Instead, prejudice is established when, but for counsel's error, there is a "reasonable probability" that the outcome of the trial would have been different, and, thus, confidence in the outcome is undermined. Id. at 694. This standard for prejudice "is not a stringent one. It is less demanding than the preponderance standard." **Hull v. Kyler**, 190 F.3d 88, 110 (3d Cir.1999) citing **Nix v. Whiteside, supra**, **475 U.S. at 175.**

The question for this Court is "whether there is any argument that counsel satisfied **Strickland's** deferential standard." **Harrington v. Richter**, 131 S.Ct. 770, 788 (2011). Considering the circumstances of this case, and what counsel actually knew, it is quite obvious that counsel provided a deficient performance, and as a result Petitioner suffered prejudice.

The state record evinces that the Commonwealth's case hinged on the testimony of Bruce Wagner. Without his testimony, the Commonwealth's Case, would have been tenuous at best, relying solely on circumstantial evidence. Had counsel acting within the realms of professional assistance requested a **Kloiber** charge, the trial court based on the law would have had to honor that request. As a result, the jury might very well have acquitted Petitioner knowing that Wagner was the key piece of evidence. A **Kloiber charge** is a curative instruction to eleviate wrongful convictions based on faulty identification.

Thus, the Pennsylvania Superior Court unreasonably applied **Strickland**, and ignored evidence presented that establish that Bruce Wagner, Commonwealth's only eyewitness, equivocated on a prior occasion when identifying Petitioner. 28 U.S.C. §2254(d)(1)-(2).

E. GROUND FIVE: Cumulative Effect of Trial Counsel Errors.

The Pennsylvania Superior Court acknowledged that Petitioner was not harmed by counsel's actions in two areas i.e., failure to file motion to suppress in-court identification and failure to request curative instruction. Superior Court Opinion at 10-15. However, the Superior Court failed to adhere to the precept that the cumulative effect of counsel's errors can amount to a denial of the right to counsel.

In **Strickland v. Washington**, 466 U.S. 668 (1984), defendant is required to show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment, and second, defendant must demonstrate prejudice." Id. at 688. Counsel's action in not filing pre-trial motion and not requesting curative instruction, fundamentally denied Petitioner a fair trial, a trial whose result is reliable. The state court ruling, thus, is an unreasonable application of **Strickland.**

When evaluating the state court record, it is hard to conceive how a properly instructed jury could find Petitioner guilty of this crime when the Commonwealth's case would have been tenuous at best. Again, mere presence at the scene of the crime is insufficient to convict. See **Jackson v. Virginia.**

For this and other reasons stated in the context of this pleading, Petitioner ask this Court to find that his Sixth Amendment right to counsel was violated, for if not for anything else,the cumulative effect of trial counsel errors.

Conclusion

Petitioner respectfully request a new trial for the allege errors of trial counsel, **or** in the alternative an evidentiary hearing.

Respectfully Submitted

CERTIFICATE OF SERVICE

I, Terrance Fowler, hereby certify that this Reply to Respondent's Answer was forwarded on the party below via U.S. first clas pre-paid mail:

Erie County District Attorney's Office
140 W. Sixth Street, Suite 506
Erie, Pennsylvania 16501

Date: Oct 1, 2014

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October 1, 2014

Susan Paradise Baxter
United States Magistrate Judge
United States District Court
Western District of Pennsylvania
17 South Park Row, Room A280
Erie, PA 16501

RE: C.A. No. 14-151 Erie

Dear Honorable Judge Baxter:

Enclosed you will find original and copy of the Reply to Respondent's Answer. The copying machine here at the prison was having malfunctions, so excuse the copy that have lines on it. Thank you for your time and consideration in this matter.

Sincerly,

Terrance Fowler

TF
CC:file

EXHIBIT "A"

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July 24th, 2013

Terrence Fowler – KF4317
SCI Smithfield
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Huntingdon, PA 16652

Dear Mr. Fowler

Enclosed, please find a copy of the final order which the court sent in your case. I do not see anything within the court's order which would be an appropriate appealable issue. However, if you insist on appeal being filed on your behalf, I must receive a written request from you no later than August 5th, 2013.

Please let me know if you have any questions.

Very Truly Yours,

Tina M. Fryling